APPEAL NO. 161816
FILED OCTOBER 31, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 16, 2016, with the record closing on July 25, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. L) on January 7, 2016, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) Dr. (Dr. M) was properly appointed to serve as designated doctor on the issue of extent of injury in accordance with Section 408.0041 and Rule 127.1; and (3) Dr. M was not properly appointed to serve as designated doctor on the issues of MMI and IR in accordance with Section 408.0041 and Rule 127.1. The appellant (claimant) appealed, disputing the hearing officer's determination that the first certification of MMI and IR from Dr. L on January 7, 2016, became final under Section 408.123 and Rule 130.12. The claimant additionally appealed the hearing officer's determination that Dr. M was not properly appointed to serve as designated doctor on the issues of MMI and IR. The respondent (carrier) responded, urging affirmance of the disputed finality determination as well as the determination that Dr. M was not properly appointed to serve as designated doctor on the issues of MMI and IR.

The hearing officer's determination that Dr. M was properly appointed to serve as designated doctor on the issue of extent of injury in accordance with Section 408.0041 and Rule 127.1 was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that on May 9, 2016, the claimant filed a Request for Designated Doctor Examination (DWC-32) requesting a designated doctor be appointed on the issues of MMI, IR, and extent of injury. The claimant did not attend the CCH but was represented by an attorney at the CCH. The medical records reflect that the claimant was injured when he was lifting cement panels for posts.

FINALITY

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the first valid assignment of an IR is final if

the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means and that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c). Rule 130.12(c) provides, in part, that a certification of MMI and/or IR assigned as described in subsection (a) must be on a DWC-69. The certification on the DWC-69 is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage IR assigned; and (3) there is the signature of the certifying doctor who is authorized by the Texas Department of Insurance, Division of Workers' Compensation (Division) under Rule 130.1(a) to make the assigned impairment determination.

The hearing officer found that on January 7, 2016, Dr. L, treating doctor, certified that the claimant reached MMI on January 7, 2016, with no permanent impairment as a result of the compensable injury and was the first doctor to certify MMI and determine no impairment. The hearing officer also found that Dr. L's certification of MMI and determination of no impairment was a valid certification for purposes of Rule 130.12(c). The hearing officer additionally found that Dr. L's January 7, 2016, certification of MMI and determination of no impairment was delivered to the claimant by verifiable means on February 11, 2016. These findings are supported by sufficient evidence. The hearing officer correctly noted that the documentary evidence included the tracking information sheet from the United States Postal Service which shows that as of February 11, 2016, the certified mailing was unclaimed and sent back to the carrier. The Appeals Panel has held that evidence of attempted delivery and the date notification was attempted can constitute written notice through verifiable means. *See* Appeals Panel Decision (APD) 100316, decided May 7, 2010; APD 080745, decided July 25, 2008; and APD 121814, decided December 10, 2012. We note that the preamble to Rule 130.12 discusses how written notice is verifiable and goes on to state at 29 Tex. Reg. 2331, March 5, 2004:

> . . . a party may not prevent verifiable delivery. For example, a party who refuses to take personal delivery or certified mail has still been given verifiable written notice.

Rule 130.12(b)(1) provides, in part, that only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under Rule 150.3(a) may dispute a first certification of MMI and IR under Rule 141.1 (related to Requesting and Setting a Benefit Review Conference) or by requesting the appointment of a designated doctor, if one has not been appointed. In the instant case the hearing officer found that Dr. L's certification of MMI and determination of no impairment was delivered to the claimant by verifiable means on February 11, 2016. The 90th day from

February 11, 2016, is Wednesday, May 11, 2016. As previously stated, the parties stipulated that on May 9, 2016, the claimant filed a DWC-32 requesting a designated doctor be appointed on the issues of MMI and IR. The hearing officer found that the claimant did not dispute Dr. L's January 7, 2016, certification of MMI and determination of no impairment within 90 days of delivery. However, May 9, 2016, is within 90 days of February 11, 2016. The claimant requested a designated doctor be appointed on the issues of MMI and IR within 90 days of the date the hearing officer found the first certification was delivered to the claimant by verifiable means. Accordingly, it was error for the hearing officer to determine that the claimant did not dispute Dr. L's January 7, 2016, certification of MMI and determination of no impairment within 90 days of delivery. We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. L, treating doctor, on January 7, 2016, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. L, treating doctor, on January 7, 2016, did not become final under Section 408.123 and Rule 130.12.

PROPER APPOINTMENT OF DR. M FOR MMI/IR

The hearing officer failed to make a finding of fact regarding whether Dr. M was properly appointed for the issues of MMI and IR in accordance with Section 408.0041 and Division rules. However, the hearing officer correctly noted in his discussion that in this case, whether Dr. M was properly appointed on the issues of MMI and IR turns on whether the first certification of MMI and determination of no impairment from Dr. L became final under Section 408.123 and Rule 130.12. Under the facts of this case, since we have reversed the hearing officer's determination that the first certification of MMI and assigned IR from Dr. L became final under Section 408.123 and Rule 130.12 and rendered a decision that it did not become final, we reverse the hearing officer's determination that Dr. M was not properly appointed to serve as designated doctor on the issues of MMI and IR in accordance with Section 408.0041 and Rule 127.1 and render a new decision that Dr. M was properly appointed to serve as designated doctor on the issues of MMI and IR in accordance with Section 408.0041 and Rule 127.1.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. L, treating doctor, on January 7, 2016, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. L, treating doctor, on January 7, 2016, did not become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that Dr. M was not properly appointed to serve as designated doctor on the issues of MMI and IR in accordance

with Section 408.0041 and Rule 127.1 and render a new decision that Dr. M was properly appointed to serve as designated doctor on the issues of MMI and IR in accordance with Section 408.0041 and Rule 127.1.

The true corporate name of the insurance carrier is **ACADIA INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CRAIG SPARKS
122 WEST CARPENTER FREEWAY, SUITE 350
IRVING, TEXAS 75039-2094.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge